CHARGING PARTY (UNION) EXHIBITS 13 - 23

CHARGING PARTY – CNA EXHIBITS

BEFORE THE

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DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers and NATIONAL NURSES ORGANIZING COMMITTEE (NNOC)	CASES	08-CA-117890 08-CA-124398 08-CA-131772 08-CA-144212 08-CA-153759
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Place: Cleveland, OH
Date: 03/06/17 – 03/16/17

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CHARGING PARTY – CNA EXHIBITS

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CHARGING PARTY – CNA EXHIBITS

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WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL, COMMUNITY HEALTH SYSTEMS, INC., and/or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and/or joint employers and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED	CASES	08-CA-130717 32-CA-120642 32-CA-124332
FALLBROOK HOSPITAL CORPORATION d/b/a FALLBROOK HOSPITAL and SEIU, UNITED HEALTHCARE WORKERS-WEST	CASE	21-CA-143512

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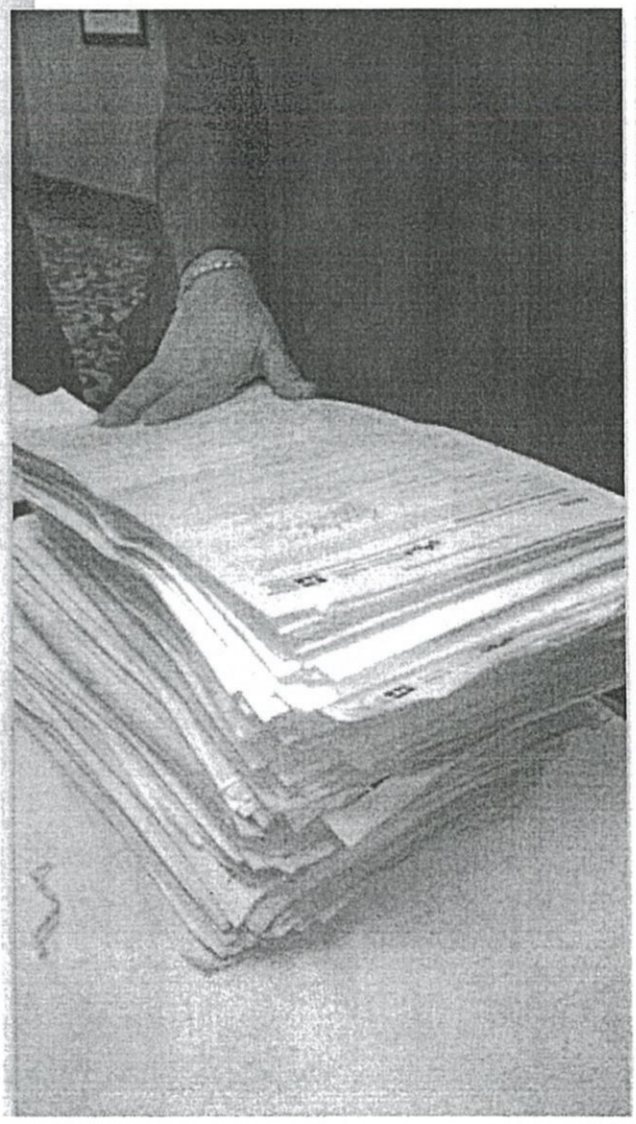
●●●○○ AT&T LTE 19:25 98%

NNOC/NNU Ohio

Michelle M Mahon
January 15, 2015

Affinity RNs will present these Assignment Despite Objection forms to management at bargaining today. Safe Staffing Now!



CNA XBT 13

29 Likes 7 Comments

News Feed Requests Messenger Notifications More

7-6-16

11:13 Employer muting

DC: Turn 2 to PPE; Insurance + Ann. Union Sec.

DC: DID NOT BRING Copy in Rejected Package proof.

WS: Yes on a computer document but then are items that we can find.

DC: ? Is it safe to come to an agreement that these items must be present? written Ann. Sec. Practice Success Log.

WS: Yes.

11:14 - Adjourn Caucus.

Mediation - 11:39

Code of Conduct SHC applies everywhere

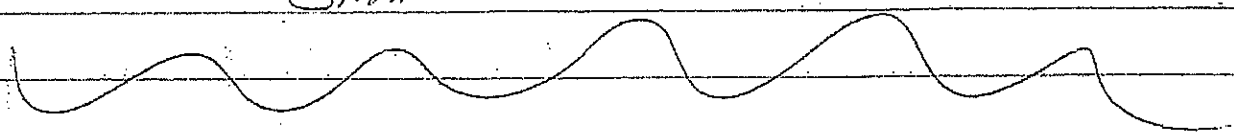
CNA Exh 14

p3

7/6/16

~~ED~~	OR
CATH	PACU
CVOR	SDS
ICU	ENDO
CVS	CARD
	~~[illegible]~~ ORTHO
	SMA

Tele



12:25 Lunch.

M-F 3PAT Lisa Byng Millie Szabo, Fink
A'S 8^{50}-5 x 5 6^{30}-5 9,10 Weekends
Δ to 6^{30}-3 5,8 6^{30}-5 5x
7^{30}-4

Rationale: ?

Stand on Package Proposal
Nothing further to offer

6/16/14

~~All pages~~

Cerner Discussion

PART 1 (20 pages)

CMAX 15

GC Exh

6/16/14

PART 1

GC Exh. ____

CNA
6/16/14 10:10a

DC: Angie - address

Angie: Provide us w/ list as individuals working with for discipline?

m.m: Reps?

Angie: Yes. Then I'll know who to contact.

JB: Where start?

DC: Provide info

Angie: FMLA source. (Passes out info)
Memo re: Conversion to FMLA Source Directs employees whom to contact

JB: Went to all mgrs

All leadership — to explain

Communicated thru Staff Meetings?

Yes.

Any agendas?

GC Exh. ____

6/16/14

AB: Most of this goes to HR.

JB: Can we plan changes in process. Post election?

AB: Decision made earlier?

JB: Is it a decision at facility or system wide

AB: No idea. Contract between CHS + FMLA source

JB: Local affiliate opts in.

AB: Yes.

JB Contract?

AB Don't have.

JB We're interested in Contract between CHS + FMLA source

JB Who at affiliate makes decision to participate?

Angie: Me

Able to identify what's different?

GC Exh. ____

6/6/14

AB In past, med info came to HR office. Opinion – my thought better approach. Review handled through 3rd party and they're experts. FMLA extensive & better if experts. Insures confidentiality.

JB You don't have access?

AB No. Leave (explains not available to HR – specifics

JB Can't ask what leave is about. Not JB or leave?

AB: Medical professionals review documentation.

JB What's

AB: Don't want to make clinical judgement.

JB So they are?

AB Physicians – often if someone is released to work.

JB: Sounds like worker's comp.

GC Exh.

6/6/14

AB If surgery, release date

Policy

Maybe earlier. How is it different?

AB: Before came to HR now call #.

JB: If I'm an employee, what's different?

AB: Nothing

JB: If I have letter from doc, HBP. Intermittent. In past, I gave to you. I could schedule. How is different?

AB Now, notify FMLA Source instead of HR

Every time.

AB: Yes. Not more onerous than before. No Employee has said "Worse". But if need help HR will give it.

AB Had it from 2012. We had to be notified now FMLA so not an attendance occurrence. Burden on employee to notify that absence is

GC Exh.

6/16/14

How did it occur?

JB [redacted] Should be before or after? Always with HR?
What about manager?

AB Not usual protocol to notify manager

JB Can manager notify FMLA Source.

AB Get back to you

JB Do you get a report of number of employees using requesting FMLA? Also Denials?

AB: Yes.

How often?

Infrequently, usually not timely documentation

Can FMLA Source require other doctors for intermittent.

Does not require a physician's note?

What if they are?

They're not.

GC Exh. ____

6/16/14

How do you know? Contradicting self

DC: Put it in writing. If you think policy change
We'll
Discussion provoking her.

Refusing

JB not at all. Not badger her –

DC. Just what you're doing. Putting on a show.
What else?

JB Interested in contract.

DC You'll put it in writing

From feedback

AB Policy is same; if problem, I can intervene &
resolve issue. Benefit employee

JB # people denied FMLA & will put in writing
What next – do you have response to proposal?
↓
So not respond?

GC Exh. ____

6/6/14

DC: not today.

JB: Waste time - discussion about something productive & positive. Beth, why you're here.

AB: Changes to policies - 13 policies. None of changes implemented - here for you to review.

JB: Would actually say this is progress

Angie: (Hands out policies)

JB: 5 min break

10:45

JB: On FMLA, one issue. If personal employee's doc says "condition", can FMLA doc override it?

AB: Shouldn't happen, but could ask for additional info.

JB: FMLA Source - not make clinical determ GC Exh ion, just processing?

6/6/14

Should be - nothing I wouldn't do.

AB — Outline of issues surrounding electronic record.

JB — Questions - Why "Cerner"?
Then issues with rollout.

Angie: Neither Beth nor I had any part of decision regarding selection of vendor

JB: CHS decision

Beth — My understanding — number of vendors & chose from.

JB: Massilon or Franklin, TN?

Beth — Don't know.

JB: Don on your list — who made decision

DC: Is it on list?

JB — Yes. A 2.

JB — Can hospital opt-out?

GC Exh. ____

6/16/14

Beth | Not involved in decision.

MH | Could use Epic?

Beth | Not involved in decision.

JB | Systemic - does hospital have to pay?

Beth | Don't know.

Angie: | Question - what is relevance to union

JB | Alternatives evaluated?

DC | Operational decision

DC | Still don't see how relevant.

JB | It is - Typically must provide Contract, alternatives, costs, can local affiliates opt out of system. Understand can't, but maybe you can. Largest are Epic & Cerner

Like it better?

Most facilities like Cerner because it's easier to bill.

GC Exh. ____

10

6/16/14

MM: Epic more nurses like.

JB: Not clear. Please start off about what's [illegible] unfolding training & then timeline.

Beth: Makes sense. Not involved in initial - other job. Before - completely paper. Since Cerner - maintaining Meaningful Use requirement
Every week phone call
Care Net, Pharm Net, Path Net

JB: Group responsible for overseeing it @ Affinity

Beth: Essentially all RNs - give input & send list to Cerner.

JB: Administrative - systematically

Beth: RNs go to Mgr or Beth. If educational, sends to Cerner or do training itself.

JB: What is Title?

Beth: RN Liason?

JB Are there other liasons w/in Affinity? Pharmacy

GG EXH.

6/16/14

JB | Dir of Pharm. Dir of Lab and you. Others involved?

Beth: | IT has clinical analyst

Angie: | Clinical Informaticist

JB | Your role.

Beth | Different role. Oversaw all aspects pt.

JB | Affinity person?

Beth | Yes.

AB: | Person no longer here.

mm: | Who is clinical analyst?

Beth: | Debbie

JB | Who do meet with? If Cerner consultant

AB | Administrative Team & Beth - Chief Officers & Beth

JB | When original project - who

Angie: | Admin Team - then trickled down.

GC Exh. ___

6/16/14

Who gives authority?

Beth — Infomaticist - Greg Kranz ; RN Educator - Heather Rhodes
Doing our timeline now done.

JB — Then adopt a timeline?

Beth — Yes.

JB — When meetings? One issue is not lots of time between decision.
Is

Beth — Changes based on phases.

JB — Who dealing with?

Beth — Dan Kinder. On site. Headquarters KCity but here
This is his project.

JB — CPOE?

Beth: — None from physicians
RNs enter all

MM: — Doesn't stand for physicians - so not done

GC Exh. ____

6/16/14

Beth	Entry is being done by RNs – since last year.
JB	Walk through process
Beth:	1 yr ago – RN documentation + order entry
	Preliminary.
Amy:	Physician writes + then we enter enter into computer.
JB	All RNs.
Beth	Yes.
Amy:	In our dept – send with chart. OP not entered. Only put in order for L4 or DS. Goes to med records
Beth	Pharmacies enter medications – RN cannot.
JB	Why
Beth	Pharm – per Bd Board – have to verify that medication is correct.
Angie:	Only referring to OP?

18

6/16/14

Amy:	If done during procedure, can enter them.
JB:	Phases to RN documentation
	All implemented at 1 time
	Cerner gave timelines — Don interested in seeing this + back + forth will follow-w/ request. Training provided.
Debbie Ann	As a trainee. We were provided w/ 2 days w/ completely classroom oriented training
JB	Decision how?
	Cerner guidelines?
JB	Interested in seeing.
JB/MH:	Was assessment of RN computer skills
Beth	Determined during. Problems — extra training
	What?
Beth	Skills lab + schedule of training.

GC Exh. ____

6/16/14

Member	Not all RNs received 2 days – some 1 8 hr.
Beth	Decision made by dept. Surg 1 day.
Member	Ours shortened. Crash.
MM	ED only hours
Beth	Decision of Dept.
MM	Anaje – training/actual?
AB:	Educator may have records.
JB	Mgr – comes out of budget?
Beth	No. Not familiar w/ ED charting & were @ level of competence that floor RN not
JB	Was there a conference where Mgr.
Beth	Don't know.
JB	Training different?
JB	If people work on multiple units?
Beth	No – same training.

6/16/14

Angie: On several occasions I floated to unit but not fully competent - assisted others. Never required to use system. Extra person to do call lights.

After?

Angie: No always a discussion - sitter, call lights.

JB: In terms of training. Was con

Angie: If regularly did, would have 2 different trained

MM: So RNs who float from ICU to others - charting completely different. What's been done for them?

AB not really understanding.

MM Like a "glitch" - documents different on other unit. If done on back end rather than front end - due to problem. May be better if other way

Angie: Perhaps example.

Pam: If Pam goes to telemetry, asks for primary RN or secondary. If ICU - different request, never telemetry.

6/16/14

Because badge as ICU RN, documentation is for ICU. Different as to Telemetry RN. Rehab - just floated the other day - use Cerner for vitals + pharmis Assigned w/o training. Was only RN - not even a regular aide. Uncomfortable w/o familiarity w/ procedures. Know that SR Mental Health is too. - RNs floated are not familiar w/ procedure.

JB: Heard this before?

Beth Not ICU -

JB But had heard Sr Mental Health.

Beth Yes. And over House Sups. Ensure RN not only

nurn One thing hoping is pathway for remedial issues & pathway for projected changes

Beth Hopefully will get remedial OK - gave issues

JB Cerner - rollout timeline. Did have modules?

Beth Yes

JB Training modules - Interested in those & the modifications? Who had it?

Beth Yes. Me & analyst.

GC Exh.

6/16/14

MH:	Open Skills lab next? Anyone not competent?
Beth	Yes - but not told to any
Angie	Paid for additional time. Could be driven by employee request. Some cases, manager referred someone if not mastered.
JB	What timeline training to Go Live?
Beth	1 month before — 1 weeks before
Angie:	Early May — Go Live June 22
JB	Was anyone disciplined/termed
Angie:	No one terminated. One employee chose to retire
JB:	Was there discipline policy created?
Angie:	No
Pam:	Russ asked for meeting w/ Bill Osterman wanted addressed. Denied meeting.
JB:	From hospital's perspective - everyone trained
Angie:	To best of knowledge.

GC Exh. ____

6/16/14

JB — What superusers? How selected.

Beth — If aptitude for it. Originally trainers & then others

[redacted]

trainer from Cerner – contracted w/ CHS.

JB — How were these selected?

Beth — Willingness to make commitment.

Anne: — Sara chose her – she couldn't commit because busy & computer crashed so practically no training.

JB: — So undertaking same process?

Beth — Yes.

JB — Would like to see list of trainers. & trainers in phase 1 – Cerner trained. When

Don't know. Wasn't one of those.

Beth — If Superuser – were they Resource. Scheduled 24 hrs/day for 4 weeks to be available.

Beth — If Med/Surg – someone staffed 24 hours/day.

6/16/14

MM: Did have pt assignment?

Angie: No.

JB: Was there additional staff.

Beth: Yes - if had it.

Angie: Always an attempt.

Beth: Called "Green Shirt" people. Cerner implementation team was there for a couple weeks.

JB: After training period - then what?

Beth: Additional resource person for 3 months. We've had them for 1 year since go-live.

JB: One person

Lots → 3 → 1 after 1 month

Next phase - same kind of process.

Angie: Start with timeline & if request additional from Cerner.

Is there a parallel person

GC Exh. ____

6/16/14 Cerner

PART 2 (20 pages)

GC Exh. ____

21

6/16/14

Beth: Regional Clinical Informaticist – Kimberly Nagel

CHS I-Connect bulletins – from her.

No. Production release from team @ CHS – Stephanie

Meeting. Leads phone calls from hospitals on Cerner.

Beth: Not sure where hospitals are located.

Does Kimberly report to Stephanie

Believe they are peers.

Dan – regional?

No. Only deal w/ Dan.

Would Kimberly deal w/ Dan?

Don't know. Stephanie – get Cerner to work

Systemwide –

3 Hubs – CH – Northside
– Trumbull
– Rehab
– Affinity

– 2 other hubs based on location

GC Exh. ____

22

6/16/14

CHS has lots of hospitals. Dan is Affinity

Is there someone @ Cerner for hub you deal with?

No. Deal with Stephanie. 3 different Servers.

Could modifications from Affinity affect Northside?

All changes must agree. If want to add GI drain, Northside will see it.

CHS calls - are Cerner on it?

Cerner reps to troubleshoot for hub. All Hubs are on call +

All of Hub 1 on same timeframe for implementation.

Process question - if issue with system - how does it get fixed?

Example - upgrade something doesn't function. Talk w/ IT Debbie Colangelo. She opens IT ticket with Corporate - priority assigned.

Ticket to Cerner & an internal CHS?

GC Exh. ____

6/16/14

All goes through CHS ticket.

Does RS get ticket #?

Yes.

Does it go to mgr?

No - Service desk tries to contact employee. If connectivity, CHS. If not, goes to Cerner to fix.

Who evaluates if CHS or Cerner

IT has decision tree - Affinity. Or 24/7 to CHS.

Affinity IT Dept availability?

M-F day but take call so can come in & take care of it.

If Affinity - issue can be done w/o corporate.

Does someone get list of tickets - @ Affinity.

IT Director gets it - Mary.

If something to be Cerner issue.

GC Exh. ____

24

6/16/14

Debbie Colangelo reports to Mary - she'd report it.

Are there other IT people dealing with it?

Not like Mary or Debbie. Can take call & send to them

Break 11:54

1:03p

JB: III Meaningful Use Attestation

Debbie Colangelo reviews attestations. Starting Stage 2 July 1

Are you familiar with Stage 1 part

Somewhat.

Competent in CPOE in Stage 1? You submitted to Medicare.

I did not submit it nor am familiar. Should not speak to.

JB: (Reads)

GC Exh. ____

6/16/14

In Stage 1, ER Dept counted toward Stage 1.
In Stage 2 In patients

~~>30% of all their pts admitted to hospital or~~
ER

Qualified thru ER.

Stage 2 Reporting period begins July 1, 2014.

Is reporting period time to get up to spud?

3 months.

Major thing accomplished to date?

Yes. Affinity Srage 2 is physicians

Oversight IV. Ad hoc mostly?

Yes. Input from RNs via ticket. Used to have Superuser Meeting & then send to Cerner.

Amy: Just for floors or everyone

JB: Is there a list of Superusers?

GC Exh. ____

6/16/14

Believe so - can check for minutes. Bill Osterman ran the meetings.

~~Have you worked with him?~~

I let him know what problem is. You may want to see

Written reports — no - emails? no.

Only Enhancement Form request. Just a request to change wake-up. Can be by ticket.

Who else?

RN or anyone else. Same process as opening ticket.

Difference.

Ticket - hardware issue, connectivity, something different. Enhancement — fixed something needed.

JB: Ticket captures errors, Enhancement is not working the way supposed to. Do Enhancement Requests come to you

Beth: Yes. CAST meeting.

GC Exh. ____

6/16/14

HIM, Info Tech, Betty, Quality, Nursing meet in CAST.

~~Specialty Workbench Groups?~~

Yes.

How often meet

Every other week

Troubleshooting Committee?

Beth: Bring forward issues + proposed solutions. If someone already has issues

Is Dir of Nursing in meeting?

Yes. As clinical + myself

Is different forum for training?

Angie: Decided by discipline, then within dept.

JB: IVC. Communication of Changes. How are changes communicated. Walk through broadest to smallest. Broad – you go ahead w/ Phase 2. Small – how?

Primarily communicated to managers. Once informed we email managers'

GC Exh. ____

6/16/14

Beth: Who - clinical analyst in IT.

Example. Affinity communicated

different choice in drop down.

Is there an enhancement @ Affinity not at Northside.

No - the whole hub.

Show up in both places.

Timeline for additional rollout. Areas of concern. Usability errors

mm: Huge number of issues RNs are reporting. Interface - where are things found - changing - on vacation when come back changed w/ no notice. RNs report chart 45 min. + come back after lunch & not there.

Amy: Screen completely blank. For whole day couldn't get into system. Ticket had been closed. Someone else had to do charting.

mm: Other types - can't see estimated blood loss if need to. What is NSBL in ICU during procedure

6/16/14

Not circulating properly. There's a very long list of problems. Some into "glitch" and some in "poor design." Very dangerous / critical to somewhat [redacted] then into critical to less severe. Data lost – recovery. RN gave [redacted] medication – order changed – no record of old order. Made RN look like she had a med error.

Beth: 1st time hearing some of these. Calls Corner when heard critical.

Does something get flagged to you if med error that system detects?

Beth: no.

JB: Moving to another area. Not exhausted questions

Debbie: Example. Gets blood ready – hands off – they look – no data. Appears not communicating. Systems don't talk to each other.

They talk, but such a delay. Identified as an issue. May be education. Taking an hour to bring up solutions.

Amy: RNs being trained?

Yes.

GC Exh. ____

6/16/14

RNs –

When was reported to you?

Within past 2 weeks.

Patients upset because computer delays.
Difficult to pt in surgnet because of design.
Rehab – time consuming process.
Recovery – we're all locked behind screens.
ICU – needs direct care RN involvement.
New things in Cerner – wasted time.
Different answers from everyone.
Endo No option to chart what needs documented
Surgery – can't document + monitor PT simultaneously
ED – CT has no computer.
2100 – Not able to change time of med admin.
Reads others HH
can't get meds in timely manner
Told about changes PRIOR
JIT Bulletins tossed in corner. We need person.
Some depts – read & sign – difficult; no one to ask

How far in advance do you hear advancements?

Hear it's going to be approved, then put in. Heard fixed the next day. Discussed with all Hubs.

GC Exh. ____

6/16/14

Roughly how long does it take to process?

Approx 4 weeks ~~Hosp-Hab-Hosp.~~ If Cerner

~~had to build it based on~~

V.D Recording of Adverse Events = Ticket
Review – IT, Cutter Affinity

V.E Medication Administration Scanning

Beth: Scanner doesn't work.

Debbie: Sometimes scans differently.

member Some stuff doesn't scan – Pharmacy breaks pills into smaller doses.

Debbie: Insulin – doesn't scan. We use every week. Lot numbers are delayed.

JB: This isn't new. So what's plan for solving the problem. Generally, how does

Inform pharm. Once informed, escalate to quick subgroup of mgr – then Cerner consultant back in for med issues.

Insulin one – first I heard about lot numbers. I need to take issue back to hospital.

If 5 RNs + 1 bottle, lots of stickers. Go back to stickers.

6/16/14

Debbie: V.E. Retrieving [redacted] - Both day + night shift RN. ✓

Pam: If had ability to retrieve meds for [redacted] needs them.

Beth: Trying to add process (function) when move to Phase 2.

MM: CPOE used today when RNs enter data. So how change if doc put in order?

Beth: Currently function turned off. Pharm enters all med orders. When back on with CPOE. RN can use it.

MM: Will RNs be able to retrieve orders?

Beth: Yes. And can put med orders in.

MB: What would stop you doing that now?

Beth: In programming now. Can't do it - can't access

MM: Could do a ticket or enhancement?

Beth: It's something that can be - but not until trained to do.

GC Exh. ____

6/16/14

Break 1:50p
2:08p

Pam: Does Pharm get notification about which meds

Beth: Don't believe test scan but not sure.

Pam: We did for several months but fell by wayside.

Debbie: Not fixed by Affinity – should be CHS - med came from different distributer. Not something Pharm can do.

Beth: I'll ask pharmacy about process.

JB: Other issue – folks described ability to open ticket. People say don't have time to open ticket. Process to discuss based on discussion VF – EHR Setup.

Mr. McKinney: Can't jump back and forth between results page + lab.

Beth: I understand problem. Can't jump back + forth.

MM: Can potentially lose info.

Beth: Will ask how to work around.

GC Exh. ____

6/16/14

Debbie:	Insulin can be gotten to - has a box.
Beth:	Not everyone knows. Tidbits should be communicated.
Amy:	Care plans - no one knows how to do. No feedback and now people being disciplined.
Debbie:	Big problem, because don't know what doing.
mm:	Can't do admission, discharge + Care Plan in Cerner.
Debbie:	Pneumonia - not any way say "not applicable."
Beth:	Had discussed a couple weeks ago. ER Physician will be not applicable. If transported by staff member - have to choose "other" and review staff.
Pam:	Docs can't view nursing documentation. It's a problem. Blood sugars in ICU.
Debbie:	Heparin - no way to document bolus of Heparin
Beth:	Can't put it on MAR?
mm:	No - not in Cerner. Only document when hour. GC Exhibit a new

6/16/14

mm: Not everyday, but potential

Angie: Have you discussed issue with mgr or Beth? Which issues not addressed vs which issues not aware.

Beth: Have not heard heparin.

Pam: Physicians' discussions regarding Cerner Money issues by physicians that would use RN documentation help.

Beth: A doc from Cerner is here.

JB: F3 Difficulty In Locating

Debbie: Advance Directives — still can't find it. About 2pm everyday, so frustrated. So many issues — I'm there to take care of patients.

mm: Many RNs have same issues.
① Basic needs (Admissions, etc.)
RN feels stupid.

Debbie: Doesn't know where goes to after Beth?
No one has come to her & says you haven't done something — now 2 people got disciplined.
We're busy — want to do a good job.

GC Exh. ____

6/16/14

Debbie (cont)	Don't want to be disciplined for what we do?
Amy:	Also, time to do a ticket — taking care of patients. Someone needs to expedite the process.
Debbie:	Feedback + would like to know is heard.
Amy:	And education - may be a simple solution.
mm:	What's also eye-opening is RN blames self — it's not them, it's Computer. Very frustrating. Find out issues with everybody.
JB:	Narrative documentation
Pam:	Section where you can write. Inconvenient — You must sign it. Can't use PHYSICIAN NOTIFICATION — so need something with Vital Signs that is convenient.
Debbie:	You can comment but only given a sentence or so
JB:	Generally a problem. Maybe can't fit into a tweet."
Debbie:	System hinders efficient documentation.
JB:	Hard stops.

GC Exh. ____

6/16/14

MM: Hard stops are dangerous. Need to be eliminated. RN needs control; not tool over the RN. Don't know what it takes to make it go away – need to be able to override.

JB: Not something Affinity can do? Hub?

Beth: Most based on meaningful use

MM: Federal govt.

Angie: Lots of federal govt. We'll bring it up.

MM: Customization (A) Not appropriate documents
(B) Training offered after change 10 days later
(C) Can't often different – computer not designed to document while sitting

Angie: We'll revisit this screen issue.

JB: Override – dealt with
Staffing – when training occurred. How accommodated. As you've heard, additional time requirements
And Performance Standards – if now subject to discipline

Angie: Nothing specific to EHR that's been developed

6/16/14

Amy: Not RN issue of efficiency. Takes more time.

Debbie: Are some computers updated + others not. RN station couldn't be ind. set up (same as somewhere else)

Beth: Beth will look into — IT issue. Dictation computers for physician.

MM: RNs locked out for 90 minutes. Work continued performance standards.

Amy: 2 RNs could get in, rest could not.

JB: Suggestion on how next to proceed. Want discussion sooner rather than later. Some contract, but some working condition for effects bargaining. Correct what's been done; others not.

Must kick it around.

Do want to take a few minutes now? Glitch about bargaining tomorrow?

GC Exh. ____

3pm: 6/16/14

DC: We're going to be touring up w/ Sr Mgt. Will correspond by email.

to schedule next dates-

DC: Day after tomorrow. May be free week after next. Where leave discussion. Proposal as to how to proceed. Some things already in works to be fixed. Policies. Take a look & let know what any changes.

Want to do in context of whole discussion. Parallel process to do with contract negotiations but w/o changes need to be bargained.

Why time is of the essence.

Have right to people on committee. Up to you because made offer. On wage issue. Make determinations annually.

~~On wage~~

We make it.

Abide by status quo. If criteria, interested in knowing what it.

GC Exh.___

40

6/16/14

Accepting as proposal.

We'll have

Several people off because thought bargaining.

If let people know came work, they'll try. Not tracking.

What if wants to work?

Notify manager – if hole

Do we have to use PTO for days to bargain.

Unpaid?

Yes.

Beth: Do you have regular hours?

Policy – Request day off - your PTO.

A little

GC Exh. ____

ARTICLE 30. PATIENT NEEDS – STAFFING

SECTION 1. GENERAL PRINCIPLES

The Facilities shall have a staffing system based on assessment of patient needs in conformance with the accreditation requirements of the Joint Commission on Accreditation of Hospitals and ***applicable state law***. The Hospital, CHS agrees to meet and negotiate over changes adopted by either body during the term of the contract.

The patient classification system shall be a method of determining staffing requirements for each patient, each unit and each shift as appropriate, based on physical observation and assessment of each patient by the RN who is responsible for the patient.

The system will be adhered to in all areas to which it is applicable and for patient care areas such as outpatient surgery, equivalent or appropriate systems for assessing staffing needs will be maintained. In the event the scheduled staffing is insufficient to meet the specific staffing ratios called for by the system, the Facilities will make every reasonable effort to procure additional personnel. Should persistent shortages be identified, the Facilities will take the necessary step to ensure safe patient care.

The staffing system with full information summarizing or explaining the system will be located in the appropriate manual on every nursing unit, and a copy will be provided to the Professional Performance Committee upon request.

As a general practice, newly hired nurses will not be counted in the regular staffing complement during orientation or portions thereof as designated in advance by the Facilities provided, however, that the Facilities shall determine the duration and scope of orientation to be given based upon the Nurse's prior experience and/or training. Exceptions to this general practice may occur provided that such exceptions shall not be unreasonably made. Within ninety (90) days of ratification of this Agreement, Facilities shall, upon request, make available for review by NNOC its orientation practices relative to newly hired nurses if those practices have changed since the Facilities last submission and subsequently if Facilities changes these practices.

SECTION 2. PATIENT CLASSIFICATION SYSTEM COMMITTEE

1. The patient classification system used by each Facility for determining nursing care needs of individual patients shall:
   - reflect the assessment of patient requirements made by the direct care RN; and
   - provide for shift-by-shift staffing based on those requirements.

2. The system shall include, but not be limited to, the following elements:
   - individual patient care requirements, including the nursing process;
   - the patient care delivery system;
   - generally accepted standards of nursing practice; and

- the unique nature of each Facility's patient population.

3. In accordance with ***state law***, the responsibility for review of the reliability and validity of the patient classification system, and for recommending any modifications or adjustments necessary to assure accuracy in measuring patient care needs will be function of a committee appointed at each Facility. The committee shall consist of an equal number of representatives of nursing management and RNs appointed by the Professional Performance Committee (the exact number to be determined at the local table) -- the Patient Classification System Committee shall consist of six (6) representatives of nursing management and six (6) RNs appointed by the Professional Performance Committee. The review referred to in this sub-Section 3 shall be performed annually and completed no later than December 1 of each calendar year. The Facility will make its best effort to implement within thirty (30) days recommendations that are approved by Management. Members of the committee shall be paid at their straight time hourly rate for time spent in attending committee meetings. Such time is not "time worked" for overtime purposes.

4. The Facilities shall notify the PPC of proposed changes to the Patient Classification System or staffing matrices which result in a reduction of RNs covered by this Agreement within 30 calendar days of the proposed implementation date of the changes. Simultaneous with the notification of the proposed change(s), each Facility shall supply NNOC with the reasons for the proposed change(s). Nursing Administration will meet with the PPC upon request to discuss the system proposed changes in the system and the conformance of the system to the requirements of this Article.

5. Differences of opinion under B.4 of this Article shall be handled under the following provisions:

   a. In the event there is such a difference of opinion, the PPC shall refer the issue to the Chief Nurse Executive ("CNO") of the facility where it has arisen. The PPC shall simultaneously provide the following information writing to the CNO:
   (1) A detailed description of the facts which have given rise to the difference of opinion, including dates and times where appropriate;

   (2) The provisions of this Article that are relevant; and

   (3) The proposed remedy or resolution.

   b. Provided the written referral is in compliance with sub-section 4 above, the CNO shall respond to the PPC within 30 days of receipt of the written allegation of violation.

   c. If the difference of opinion is not resolved by this process, the PPC may

bring this matter to the Special Review Committee established under article twenty-nine (29) of this Agreement, provided there is a written referral to the Review Committee within thirty days of the CNO's response.

SECTION 3. NURSE PARTICIPATION IN BUDGET DEVELOPMENT PROCESS

Each year, Staff Nurses on each nursing unit shall be notified in advance and allowed an opportunity to submit input during the Facility's annual budget development process. During that period of the Facility's budget development when standard hours per patient day ("standards") for each unit are reviewed, the Unit Representative appointed by NNOC shall solicit input from Staff Nurses at a Staff Meeting and together with the Nurse Manager for the unit may meet with the CNO. Upon request and at reasonable times thereafter, the unit staff may consult with the CNO and Nurse Manager on the appropriateness of the standards and related issues. Upon request at Unit Staff Meetings, all RNs shall be involved in the discussion of the appropriate staffing mix for their unit.

NNOC Proposal to Affinity Medical Center

Date: 2/24/14

Time: 948 am

ARTICLE 31. STAFFING RATIOS

Upon the ratification of this contract, the Hospital shall comply with the following nurse to patient ratios to provide quality care at this facility:

Department	Registered Nurse	Patients
Med Surg	1	5
Tele	1	4
Stepdown	1	3
ICU	1	2
Surgical	2	1 (one circulating and one scrub)
PACU	1	1
Endo	1	2
ER	1	3
ER	1	2 (critical care patient)
ER	1	1 (trauma patient)
Cath Lab	1	1
SMH	1	4
Ortho	1	4
Rehab	1	5

*Same Day Surgery to be proposed….
*In case of emergency Pediatric Medical Patients will be 1 RN to 4 like patients…
*Pediatric patients in phase 1 recovery will be 2 RNs to 1 child…
*Pediatric in phase 2 recovery will be 1 RN to 1 child…
~~*Pediatric patients will Not be admitted to inpatient units~~

The above ratios are the minimum nurse to patient staffing requirements. Higher patient acuity will require additional RN staff as determined by the individual professional judgment of each RN caring for the patient.

Failure to staff as above shall obligate the Hospital to pay the RNs on duty in the department/shift that is short staffed at (1 ½) time and one-half the straight time pay for each RN. This article is subject to the Grievance and Arbitration provisions of this contact.

TA

counter

NNOC Proposal to Affinity Medical Center
September ~~4~~ 5, 2014

Article ___: On-Call/Standby and Call Back

Section 1: Definitions

On Call/Standby: Nurses who are placed on On Call/Standby Duty shall be unrestricted in the use of their free time, although the nurse must (a) leave a telephone number where the nurse can be reached or carry a pager or beeper and (b) be capable of reporting for duty within thirty (30) minutes of being summoned by the Employer.

Call Back: When a nurse is asked to work by the Hospital after the nurse's normal shift ends to meet special needs, the time spent at the Hospital shall be considered "Call Back." For those nurses who work on a unit where there is not a "normal shift" end time, that is, those nurses end times are irregular, the end of a shift for "Call Back" purposes shall be eight and one-half (8-1/2) hours from the commencement of the nurses' workday.

Section 2: On Call/Standby Compensation

In specified departments at the Hospital, nurses are eligible for "On Call/Standby" compensation when they are placed "on-call" outside their regular shift, or if they have been cancelled and are asked to placed "on-call." Compensation for time categorized as "On Call/Standby" will be [to be negotiated by the parties during economics.]

Section 3: Call Back Compensation

In the event a nurse who is "on call" is called ~~back~~ to work, the nurse shall receive time and one-half (1-1/2) the straight time regular hourly rate for all hours actually worked during the call back, ~~for a minimum of two (2) hours.~~ Nurses will not be paid "On-Call" and "Call-Back" compensation simultaneously; that is, "On Call" pay ceases when "Call Back" pay begins."

→ If the nurse has left the hospital and is called back to work, the nurse will be paid a minimum of two (2) hours on call at time and one-half (1 1/2) the straight time regular hourly rate.

CNA 17

EXHIBIT NOT SUBMITTED

CHARGING PARTY/CNA's Exhibit No. 18

Case Name DHSC ( ) Identified

Docket No. 08-CA-117890 ( ) Received

Date 3-09-17 ( ) Rejected

This exhibit is not being submitted with this case because it was:

( ) Identified, but not offered in evidence;

( ) Identified, received, but withdrawn from evidence;

( ) No duplicate was furnished to the Reporter;

( ) Withdrawn by _____ in order to make duplicate(s);

( ) Retained in the possession of _____

(✓) Other EXHIBIT NEVER IDENTIFIED, OFFERED OR RECEIVED INTO EVIDENCE BUT A COPY WAS GIVEN TO THE REPORTER

_____
Signature of Presiding Official

NNOC Union Counter-Proposal to

4-21-14

AFFINITY MEDICAL CENTER

&

NATIONAL NURSES ORGANIZING COMMITTEE

8/12/14

~~MANAGEMENT PROPOSAL~~

IN-SERVICE EDUCATION, TUITION REIMBURSEMENT AND ORIENTATION

Red 4/7/14

MARCH 29, 2014

ARTICLE . IN-SERVICE EDUCATION, TUITION REIMBURSEMENT AND ORIENTATION

SECTION 1. IN-SERVICE EDUCATION

The Hospital shall continue to provide continuing education opportunities on an in-house basis through the Hospital's Department of Education and the respective patient care or service departments. This shall include cross-training to help Registered Nurses meet new nursing responsibilities within the Hospital.

(a) In-service education shall be provided to nurses prior to their assignment involving specialized equipment or care.

(b) In-service shall be provided at regularly scheduled hours best to meet the needs of all shifts of nurses.

(c) Any continuing education programs (CE), in-service programs and/or meetings which are mandatory will be paid at straight time hourly salary.

(d) The Hospital may require nurses to attend mandatory in-service programs when it is determined that such education is necessary for the nurse(s).

(e) The Hospital shall pay for the cost of Hospital required courses.

SECTION 2. ORIENTATION

Each newly hired nurse shall be given an organized and effective orientation program. The length of such program shall be determined by assessment of the skills necessary to function at the level of practice expected for the classification and the unit to which the nurse is assigned. During the orientation period, the newly hired nurse or a nursing student shall not be included in the staffing ratio for purposes of patient care.

SECTION 3. CONFERENCE DAYS.

A. All regular full-time and part-time RNs shall receive two (2) unpaid 8-hour conference days per year for purposes of attending educational programs.

B. If a conference day is used to attend a Hospital-sponsored program, the costs of the program will be waived.

SECTION 4. TUITION REIMBURSEMENT

Section 1. Tuition Reimbursement

a. General. The purpose of the Hospital tuition reimbursement program is to establish a program to provide educational assistance to Registered Nurses who obtain formal job-related education and training during employment. It is designed and intended to provide the terms and conditions for a separate written plan document pursuant to Section 127 of the Internal Revenue Code.

b. Eligibility. Regular full-time and regular part-time Registered Nurses who have budgeted/approved hours of at least 36 hours per week (.9 FTE) are eligible to submit an application for tuition assistance if they have completed three (3) months of continuous employment and are not receiving grants or assistance from any other source. Regular part-time Registered Nurses who have budgeted/approved hours of at least forty- eight (48) per pay period are eligible for tuition reimbursement on a pro-rated basis.

c. Criteria. The proposed course of study must be work-related. For purposes of this Article, "work-related" means education directly related to improving the Registered Nurse's skills, knowledge, and performance in the Registered Nurse's present career field or to gain advancement in a health care career. Tuition assistance is only available for courses from regionally accredited institutions, such as universities, colleges, associate degree colleges, and technical schools. Tuition assistance is not available for seminars, professional meetings, and workshops. Tuition reimbursement does not apply to

continuing education units, which are necessary to maintain a license, registration or certification that is a requirement for a position. The courses for which tuition assistance is sought must be during non-work time. In determining whether to approve an application for tuition assistance, The Hospital may consider other criteria at its discretion including, but not limited to, a Registered Nurse's performance record with the Hospital. Applications for tuition assistance shall be processed in accordance with applicable Hospital policies and procedures.

d. Benefits. Educational assistance is limited to:

- a maximum of Five Thousand Dollars ($ 5,000.00) per calendar year for courses at approved nursing schools;
- a maximum of Two Thousand Five Hundred Dollars ($ 2,500.00) per calendar year for all other courses

  - Expenses eligible for reimbursement include tuition, books, fees, equipment, and supplies used for and necessary to the course.

  - As a condition for reimbursement, all Registered Nurses must execute an Educational Assistance Agreement before funds will be released.

  - The Registered Nurse must receive at least a "C" grade or equivalent to be reimbursed. In courses where no formal grade or equivalent measure of completion is normally provided, the Registered Nurse must obtain a written document from the instructor or institution, satisfactory to the hospital, indicating successful completion of the course.

  - Upon satisfactory completion of the course, the participating Registered Nurse must submit acceptable written proof of successful course completion and grade attained to the Human Resources Department. Acceptable examples include: grade report, official transcript, certificate of completion and/or a letter on official letterhead, all as endorsed by the class instructor or official or registrar.

Registered Nurses whose employment is terminated for any reason prior to the completion of their course will not be eligible for reimbursement on any basis.

e. Repayment at Termination of Employment: The Hospital shall recover a Registered Nurse's outstanding authorized debts at the time of termination (one year of service for each $2,500 of education expenses reimbursed), in accordance with State law. The Hospital is not required to pay out any accrued unused PTO hours as they are not considered hours worked (unless otherwise directed by state law.

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER,	)	CASE NO. 5:13CV1770
Plaintiff,	)	JUDGE BENITA Y. PEARSON
v.	)	
CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (C.N.A./NNOC), AFL-CIO,	)	
Defendant.	)	**ORDER OF DISMISSAL**

This Court, having filed its Memorandum of Opinion and Order, hereby dismisses Plaintiff's Amended Complaint for Breach of Contract, Specific Performance, and Declaratory Judgment and for a Speedy Hearing Under Fed. R. Civ. P. 57 (ECF No. 18).

This Order of Dismissal constitutes entry of judgment pursuant to Fed. R. Civ. P. 58. Final.

IT IS SO ORDERED.

May 31, 2016
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

CNA 19

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, Plaintiff, v. CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (C.N.A./NNOC), AFL-CIO, Defendant.	)	CASE NO. 5:13CV1770 JUDGE BENITA Y. PEARSON **MEMORANDUM OF OPINION AND ORDER** [Resolving ECF No. 45]

Pending is Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 45). The Court has been advised, having reviewed the record, the parties' briefs, and the applicable law. The Court has also considered the Memorandum by Amicus Curiae The National Labor Relations Board ("NLRB" or "Board") in Support of Defendant's Motion (ECF No. 63-2) and the oral arguments of counsel offered during the Telephonic Status Conference on March 14, 2016. For the reasons that follow, the motion is granted.

I.

In early 2012, the Parties began negotiating a framework for an agreement governing their relationship during Defendant California Nurses Association/National Nurses Organizing Committee, AFL-CIO's (Defendant or "Union") efforts to organize the registered nurses employed by Plaintiff DHSC, LLC, d/b/a Affinity Medical Center (Plaintiff or "Affinity"), as

CNA 20

well as the Parties' conduct during any collective bargaining negotiations that might follow. Amended Complaint for Breach of Contract, Specific Performance, and Declaratory Judgment and for a Speedy Hearing Under Fed. R. Civ. P. 57 (ECF No. 18) at PageID #: 200, ¶ 14. The Parties produced two documents with the terms of their negotiations—a Labor Relations Agreement ("LRA") (ECF No. 18-1) and an Election Procedure Agreement ("EPA") (ECF No. 18-2). Both documents provide terms for arbitration of disputes: the LRA provides that "[t]he Parties agree to submit any unresolved disputes about [the LRA] to final and binding arbitration[;]" (ECF No. 18-1 at PageID #: 223) and the EPA provides that ". . . either party may . . . submit [an] unresolved dispute about [the EPA] for final and binding resolution[.]" (ECF No. 18-2 at PageID #: 249). The Parties, however, did not sign or execute either the LRA or the EPA. ECF No. 18 at PageID #: 200, ¶ 16.

On August 20, 2012, the Union filed a petition with the NLRB seeking to represent registered nurses working at the Massillon, Ohio facility operated by Plaintiff. On August 22, 2012, Affinity and the Union signed a formal Consent Election Agreement (ECF No. 45-2 at PageID #: 541-43) using the standard Board form. The signed Consent Election Agreement was approved by the NLRB's Regional Director for Region 8 the same day it was signed. ECF No. 45-2 at PageID #: 543. Paragraph 12 gave the Regional Director final authority to rule on election challenges and objections. ECF No. 45-2 at PageID #: 542-43. Plaintiff does not dispute that neither party advised the Regional Director that any previous or conflicting agreements existed between them with respect to the election. Respondent's Post-Hearing Brief (ECF No. 45-3 at PageID #: 593). Thereafter, in accordance with the terms of the Consent

Election Agreement (ECF No. 45-2 at PageID #: 541-43), the NLRB's Regional office supervised and conducted the election held on August 29, 2012. One hundred votes were cast for the Union, 96 against, with seven challenged ballots.[1] Since the challenged ballots were sufficient in number to be determinative of the outcome of the election, the Regional Director investigated the matter, soliciting statements of position from Plaintiff and Defendant. The Union provided its position on the challenged ballots on September 17, 2012; Plaintiff did not file any statement or response regarding the challenged ballots. On September 5, 2012, Plaintiff filed with the Regional Director a statement of its objections to the election which made no mention of a private election agreement with the Union. *See* Report on Challenged Ballots and Objections (ECF No. 45-2 at PageID #: 545). In a letter dated September 7, 2012, the Regional Director explicitly requested that Plaintiff provide its supporting documents and advised that the failure to provide supporting evidence "will result in your objections being overruled without further investigation." *See* ECF No. 45-2 at PageID #: 548. On September 21, 2012, the Regional Director issued a report on the challenged ballots and objections, overruling Plaintiff's objections because no substantiating evidence had been submitted. ECF No. 45-2 at PageID #: 544, 548. The report concluded that four of the seven challenged ballots were cast by eligible voters. When these four ballots were counted, a majority of voters had voted in favor of Union representation. ECF No. 45-2 at PageID #: 544-49. On October 5, 2012, the Regional Director

[1] The Board agent supervising the election challenged the ballots of seven voters whose names did not appear on the list of eligible voters.

certified the Union as the National Labor Relations Act (NLRA) Section 9(a) representative of the nurses at Affinity. *See* ECF No. 45-2 at PageID #: 564;[2] ECF No. 18 at PageID #: 199, ¶ 8.

Following certification, Defendant requested that Plaintiff begin bargaining. After Plaintiff refused to bargain and denied Union representatives access to its facilities after the election, Defendant filed charges with the NLRB. The Regional Director issued a complaint alleging various violations of the NLRA. *See* Third Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (ECF No. 45-2 at PageID #: 509-21). In its Answer, Affinity raised several affirmative defenses, two of which are pertinent here: (1) that the Board's certification of the Union as exclusive bargaining representative was

> invalid, and unenforceable, inasmuch as the representation election . . .was held not only pursuant to a consent election agreement, but also pursuant to an oral "ad hoc" agreement between Affinity and the [Union] which provided that an arbitrator possessed exclusive jurisdiction to determine challenged ballots and objections related to the conduct of the representation election[;]

and (2) that pursuant to that same "oral 'ad hoc' agreement . . . an arbitrator possesses exclusive jurisdiction over the allegations set forth by the Complaint." Answer to Amended Consolidated Complaint (ECF No. 45-2 at PageID #: 531-32). Board deferral to arbitration, however, is completely discretionary. Memorandum of Opinion and Order (ECF No. 22) at PageID #: 346 ("Only the NLRB may decide to defer a pending charge to private arbitration."). On April 30,

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[2] NLRA Section 9(a) states, in pertinent part:
> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

29 U.S.C. § 159(a).

2015, a three-member panel of the Board issued its decision and order finding, *inter alia*, that Affinity had unlawfully refused to bargain with the Union and discriminatorily denied Union representatives access to its facility in violation of the Act. *DHSC, LLC, d/b/a Affinity Medical Center and National Nurses Organizing Committee (NNOC)*, 362 NLRB No. 78, 2015 WL 1956191 (2015). Relying on long-standing Board precedent, the panel majority rejected Affinity's procedural affirmative defenses regarding the arbitrator's exclusive jurisdiction under the purported "oral ad hoc agreement," finding that the parties had neither a collective bargaining agreement in place nor an established history of productive bargaining that would warrant the Board's deferring to any referenced arbitration provision. *Id.* at *1 n. 3[3] (citing *Arizona Portland Cement Co.*, 281 NLRB 304, 1986 WL 54325 at *1 n. 2 (1986); *United Technologies Corp.*, 268 NLRB 557, 1984 WL 36028, at *2 (1984); *San Juan Bautista Medical Center*, 356 NLRB No. 102, 2011 WL 702297 at *2 (2011)).[4]

The Board's unfair labor practice decision is currently pending before the United States Court of Appeals for the District of Columbia Circuit, on Affinity's petition for review and the NLRB's cross-application for enforcement of the order under § 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). *DHSC, LLC v. NLRB*, Nos. 15-1426, 15-1499.

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[3] Member Johnson also relied on the Federal Arbitration Act's requirement that agreements to arbitrate must be in writing. 9 U.S.C. § 2. *Id.*

[4] "[I]t is well-settled that the Board's authority and jurisdiction over questions of representation is exclusive; accordingly, the Board will not defer to a private dispute resolution mechanism, including proceedings under the AFL-CIO constitution, in deciding representation cases." *McLaren Health Care Corp.*, 333 NLRB 256, 2001 WL 120598, at *4 (2001).

(5:13CV1770)

On August 13, 2013, Plaintiff filed a Complaint for Breach of Contract, Specific Performance, and Declaratory Judgment and for a Speedy Hearing Under Fed. R. Civ. P. 57 (ECF No. 1) in the above-entitled action. On September 3, 2014, the Court granted Plaintiff leave to file an amended complaint. *See* Order (ECF No. 17). On September 17, 2014, Plaintiff filed an Amended Complaint (ECF No. 18) under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. ECF No. 18 at PageID #: 198, ¶ 1. Affinity alleges that it has a valid implied-in-fact collective bargaining agreement ("Implied Agreement") with Defendant which provides that both Affinity and the Union must submit any unresolved disputes about compliance with, or construction of, the Implied Agreement to binding arbitration, including disputes related to any elections. ECF No.18 at PageID #: 198, ¶ 3; 201, ¶¶ 18-20. Affinity further alleges that Defendant breached the Implied Agreement by not submitting all unresolved disputes to final and binding arbitration. ECF No. 18 at PageID #: 205, ¶¶ 30-32; 206, ¶¶ 33-35.[5] Affinity brings three claims against Defendant as a result of the Union's alleged breach of the Implied Agreement: (1) Defendant's breach resulted in damages to Affinity, ECF No. 18 at PageID #: 206-207, ¶¶ 38-43; (2) Affinity is entitled to Defendant's specific performance of the Implied Agreement's terms and conditions, including submission of unresolved disputes to final and binding arbitration, ECF No. 18 at PageID #: 207-208, ¶¶ 44-47; and (3) Affinity is entitled to a declaratory judgment mandating the Parties to submit all unresolved disputes under the Implied Agreement to final and binding arbitration, ECF No. 18 at PageID #: 208-209, ¶¶ 48-51.

[5] Affinity is not seeking enforcement of the EPA and LRA, as those documents appear in the record; however, the Implied Agreement alleged in the Amended Complaint (ECF No. 18) mirrors previously-negotiated terms appearing in those documents.

Defendant moved the Court to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 19), making multiple arguments in support, none of which questioned the Court's subject-matter jurisdiction. On August 31, 2015, the Court denied Defendant's Motion to Dismiss. *See* ECF No. 22. On September 14, 2015, Defendant filed an Answer (ECF No. 24). On December 4, 2015, Defendant filed the within Motion to Dismiss for Lack of Subject-Matter Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 45), which the Court construes as a Rule 12(c) motion. *See* Order (ECF No. 47).

II. Standards of Review

A motion for judgment on the pleadings under Rule 12(c) is reviewed under the same standard applicable to a motion to dismiss under Rule 12(b)(6). *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008). The Court must construe the complaint in the light most favorable to the non-moving party, accept all factual allegations as true, and make reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008); *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997). The complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). A motion brought pursuant to Rule 12(c) is appropriately granted "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (quoting *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

A cause of action fails to state a claim upon which relief may be granted when it lacks "plausibility in th[e] complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007). A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal* , 556 U.S. 662, 677-78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Plaintiffs are not required to include detailed factual allegations, but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. It must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly*, 550 U.S. at 556. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557 (brackets omitted).

Defendants' motion is brought pursuant to Fed. R. Civ. P. 12(b)(1) for a lack of jurisdiction. Rule 12(b)(1) permits dismissal for "lack of subject-matter jurisdiction." Lack of subject-matter jurisdiction may be asserted at any time, either in a pleading or in a motion. *See* Fed. R. Civ. P. 12(b)(1). "[S]ubject-matter jurisdiction, because it involves a court's power to

hear a case, can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U. S. 625, 630 (2002)). "A Rule 12(b)(1) motion can either attack the claim of jurisdiction on its face, in which all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). A party making a "factual attack" on subject-matter jurisdiction challenges the actual existence of the court's jurisdiction, *i.e.*, a defect may exist even though the complaint contains the formal allegations necessary to invoke jurisdiction. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996).

Challenges to subject-matter jurisdiction through a Rule 12(b)(1) motion to dismiss come in two different forms—facial and factual attacks. "In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction. . . ." *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003); *see also* 2 James Wm. Moore, *Moore's Federal Practice* § 12.30[4] (3d ed. 2000) ("[W]hen a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, . . . to resolve disputed jurisdictional facts.").

III. Discussion

Where a contract dispute brought under § 301 of the LMRA is "primarily representational," *i.e.*, a dispute within the primary jurisdiction of the NLRB, a district court may

not exercise jurisdiction if, as here, the Board has already exercised its jurisdiction and is considering, or has already decided the matter. *Int'l Bhd. of Elec. Workers, Local 71 v. Trafftech, Inc.*, 461 F.3d 690, 693 (6th Cir. 2006). Plaintiff argues that the dispute in the case at bar falls outside of the scope of "primarily representational" matters. ECF No. 54 at PageID #: 932, 944; ECF No. 69 at PageID #: 1104, 1109; ECF No. 72 at PageID #: 1136. It contends "the issues decided by the NLRB are materially different than the issues currently pending before the Court, which arise as a result of the [Union's] breaches of the [Implied Agreement]." ECF No. 69 at PageID #: 1104.[6] That the § 301 disputes at issue in the case at bar are "primarily representational" is evident from Plaintiff's stated requests for relief: specific performance of the Implied Agreement's terms and conditions, including submission of unresolved disputes to final and binding arbitration, ECF No. 18 at PageID #: 207-208, ¶¶ 44-47; and a declaratory judgment mandating the Parties to submit all unresolved disputes under the Implied Agreement to final and binding arbitration. ECF No. 18 at PageID #: 208-209, ¶¶ 48-51.

This is not a case where "the issues before the district court and the NLRB were different . . . or where the NLRB explicitly declined to decide the issue and instead deferred to the district court." *DiPonio Constr. Co. v. Int'l Union of Bricklayers & Allied Craftworkers, Local 9*, 687 F.3d 744, 751 (6th Cir. 2012). On the contrary, the case at bar raises the precise issues previously addressed by the Board: whether the election challenges and objections and,

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[6] In March 2016, the Court allowed Plaintiff to serve and file a list or discernment that offers clarification of the disputes Affinity claims should be subject to the arbitration provision of the Implied Agreement. *See* Minutes of Proceedings dated March 14, 2016. Affinity declined the offer. *See* ECF No. 72 at PageID #: 1136, ¶ 4.

ultimately, the Union's representation rights and Affinity's bargaining obligations, will be determined by an arbitrator or by the Board. The Board definitively decided that issue when it certified the Union as the employees' collective bargaining representative in October 2012 and exercised its discretion to decline deferral in April 2015. In short, as the Sixth Circuit observed in an analogous situation,

> the instant NLRB proceeding involves a representation issue, i.e., a determination of which union should represent the Olympic employees. There is a strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace. That the International has characterized the instant claim as a § 301 contract claim is of no consequence. [T]o fail to apply this policy [preemption] to § 301 actions would allow an end run around provisions of the NLRA under the guise of contract interpretation.

Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers v. Olympic Plating Indus., 870 F.2d 1085, 1089 (6th Cir. 1989) (internal citation and quotation marks omitted, brackets in original). *Accord Trafftech*, 461 F.3d at 695-96 ("When a dispute is primarily representational . . ., simply referring to the claim as a breach of contract [is] insufficient for the purposes of § 301 federal courts' jurisdiction . . .") (internal quotation marks omitted, brackets in original).

Since any decision in the case at bar cannot revoke the Board's certification of the Union as collective-bargaining representative or negate Affinity's resulting duty to bargain, entry of the requested order for specific performance or declaratory judgment would be a hollow act on the part of the Court. Mandating arbitration in the circumstances presented here would be, at best, an idle gesture and "[t]he law does not require the doing of a nugatory act." *Tacey v. Irwin*, 85 U.S. 549, 551 (1873). *See Fine v. CSX Transp., Inc.*, No. 99-1645, 2000 WL 1206526, at *2 (6th Cir.

Aug. 18, 2000) ("the law requires no one to do a vain or useless thing"). As a practical matter, no court could enforce an arbitrator's order purporting to undo the 2012 certification or finding of the Board that Plaintiff's actions did not so violate the NLRA. Affinity has not cited any case law to the contrary. Nor could it. Case law forecloses this possibility. *See, e.g.*, *Bakers Union Local No. 4 of Greater St. Louis v. Schnuck Baking Co. Inc.*, 614 F. Supp. 178, 182 (E.D. Mo. 1985) (refusing to compel arbitration under the parties' collective bargaining agreement because the dispute turned on question of representation that had already been decided by the Board under NLRA Section 9).

Deferral premised on the arbitration provision in the unsigned Election Procedure Agreement ("EPA") (ECF No. 18-2 at PageID #: 249) is also questionable given the commitment reflected in the signed Consent Election Agreement (ECF No. 45-2 at PageID #: 542-43) that gave the Regional Director final authority to rule on election challenges and objections. Such voluntarily signed election agreements are binding upon the parties. *NLRB v. General Tube Co.*, 331 F.2d 751, 753 (6th Cir. 1964). Moreover, the unsigned EPA itself conditioned Affinity's recognition and bargaining with the Union "upon the certification of the election results by the NLRB" (ECF No. 18-2 at PageID #: 234, ¶ 4(d))—a process over which the Board has sole discretion and need not defer to private arbitral mechanisms. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 116 (6th Cir. 1987).

IV. Conclusion

Because Affinity has failed to identify any disputes that fall outside primarily representational preemption, Defendant's Motion to Dismiss for Lack of Subject-Matter

(5:13CV1770)

Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 45), which the Court construes as a Rule 12(c) motion, is granted.

IT IS SO ORDERED.

May 31, 2016
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, Plaintiff, v. CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC), AFL-CIO, Defendant.	Case No. 13-cv-01063-CAS-DTB ~~[PROPOSED]~~ **ENTRY OF JUDGMENT**

On November 18, 2013, this Court granted Defendant California Nurses Association's Motion to Dismiss in its entirety with prejudice. ECF No. 24. Plaintiff Hospital of Barstow ("Barstow") submitted a Notice of Appeal on December 18, 2013. ECF No. 25. On July 2, 2014, the Ninth Circuit granted the parties' motion to voluntarily dismiss the appeal. ECF No. 29. The Ninth Circuit's granting of the voluntary dismissal served as a mandate from the court.

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CNA

21

Accordingly, judgment is hereby entered for Defendant.

It is so ordered.

Christina A. Snyder

Dated: July 25, 2014

The Honorable Christina A. Snyder

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FALLBROOK HOSPITAL CORPORATION, Plaintiff, vs. CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC), AFL-CIO Defendant.	CASE NO. 13cv1233-GPC(WVG) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THIRD AMENDED COMPLAINT WITH PREJUDICE** [Dkt. No. 23.]

Before the Court is Defendant California Nurses Association/National Nurses Organizing Committee's ("CNA/NNOC" or "CNA") motion to dismiss the third amended complaint ("TAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Dkt. No. 23.) Plaintiff Fallbrook Hospital Corporation d/b/a Fallbrook Hospital filed an opposition and Defendant filed a reply. (Dkt. Nos. 25 & 26.) The motion is submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). Based on the analysis below, the Court GRANTS Defendant's motion to dismiss with prejudice.

Background

Plaintiff Fallbrook Hospital operates an acute care hospital in Fallbrook,

CNA 22

California. (Dkt. No. 20, TAC ¶ 5.) Defendant CNA/NNOC is a labor organization and was certified by the National Labor Relations Board ("NLRB") on May 24, 2012 as the exclusive collective bargaining representative of registered nurses employed by Fallbrook Hospital. (Id. ¶¶ 6, 7.) According to the third amended complaint, around March 13, 2012, the parties met to discuss an agreement between Fallbrook Hospital and the CNA "which would define certain terms and conditions to govern any organizing which might be conducted by the CNA among Registered Nurses employed by Fallbrook, and which would define a framework for the negotiation of an initial collective bargaining agreement in the event the CNA was certified by the NLRB as the exclusive collective bargaining agent for Fallbrook's Registered Nurses." (Dkt. No. 20, TAC ¶ 14.) At the meeting, the parties entered into a proposed labor relations agreement ("proposed LRA") where the parties agreed to submit any unresolved disputes about compliance with or construction of the Agreement to final and binding arbitration, including disputes related to the conduct of any collective bargaining negotiations which might ensue between the parties out of organizing activity on the part of the CNA at Fallbrook. (Id. ¶ 15.) They also agreed that they would work together to resolve issues through direct discussion and arbitration. (Id.) The CNA representatives assumed the responsibility of preparing an initial draft of the proposed LRA. (Id. ¶ 16.) Written drafts of the proposed LRA were then exchanged between the parties. (Id. ¶ 17.)

The proposed LRA contained an "Election Procedure Agreement" which defined certain terms and conditions governing any organizing the CNA might conduct among Registered Nurses employed by Fallbrook. (Id. ¶ 18.) According to these terms, the CNA was entitled to commence organizing among RNs employed by Fallbrook by serving a "Notice of Intent to Organize." (Id. ¶ 19.) In order for the "Notice of Intent to Organize" to be effective, the CNA would have to serve any such "Notice" within 48 hours of being notified by Fallbrook that it had received written notification from another specified labor organization that the other specified labor organization was

commencing its own organizing activities among employees other than RN employed by Fallbrook. (Id. ¶ 20.) Around April, 10, 2012, an attorney from the other specified labor organization informed Carmody by telephone that a "Non-RN Notice of Intent to Organize" would be served later that day upon Fallbrook. (Id. ¶ 21.) Following that telephone conversation, the other specified labor organization served Fallbrook with a "Non-RN Notice of Intent to Organize." (Id. ¶ 22.)

On April 12, 2012, in a telephone conversation between Don Carmody, Fallbrook's representative, who is also an attorney, and Jane Lawhon, legal counsel for the CNA, Carmody informed Lawhon about Fallbrook's receipt of the Non-RN Notice of Intent to Organize." (Id. ¶ 23.) In that conversation, both discussed the fact that the proposed LRA required the CNA to satisfy the 48 hours requirements in order to serve an effective "Notice of Intent to Organize" the registered nurses at Fallbrook. (Id.) They also discussed that although Fallbrook and the CNA expected the proposed LRA would be mutually executed relatively soon, they were still in the process of exchanging comments regarding minor modifications to drafts. (Id. ¶ 24.) Further, Carmody proposed and Lawhorn agreed that the parties should simply orally agree to apply the terms memorialized in the most recent written draft copy of the proposed LRA with respect to the following terms: "a) the CNA's service of a 'Notice of Intent to Organize' the Registered Nurses employed by Fallbrook; b) [t]he CNA's subsequent organizing activity at Fallbrook; c) [t]he filing of a petition for an election with, and the conduct of a secret ballot election by, the National Labor Relations Board ("N.L.R.B."); and d) [t]he negotiation of an initial collective bargaining agreement in the event the CNA won an election and was certified by the NLRB, including the standard of the conduct of bargaining between the Parties as specified on page 5, Section 4(a)(2) of the Proposed LRA." (Id. ¶ 25.)

Pursuant to the Agreement, the CNA agreed to a standard that would apply to the parties' negotiations of a collective bargaining agreement ("CBA") and that the negotiations would be governed by a private standard developed by the parties whereby

a private arbitrator would have jurisdiction to decide whether the CNA or Fallbrook had violated the private standard that would apply to the parties' negotiation of a collective bargaining agreement. (Id. ¶ 27.)

Pursuant to the terms of the Agreement, around May 16, 2012, the NLRB conducted a secret ballot election among the registered nurses employed at Fallbrook. (Id. ¶ 28.) Around May 24, 2012, the NLRB certified the CNA as the exclusive collective bargaining representative of registered nurses employed at Fallbrook. (Id. ¶ 29.) Around June 12, 2012, pursuant to the terms of the Agreement, the parties began collective bargaining. (Id. ¶ 31.)

To demonstrate that the parties were in compliance with the terms and conditions of the Agreement, Plaintiff points to numerous instances where the parties' conduct demonstrate compliance with the Agreement. (Id. ¶ 32.) Moreover, from April 12, 2012 until September 26, 2012, Plaintiff claims that the CNA sought to resolve all disputes through the dispute resolution procedure in the Agreement and presents two examples where the CNA informed Fallbrook that it would submit the disputes to an arbitrator. (Id. ¶¶ 33, 34.)

In addition, the TAC alleges that on July 3, 2012, the parties participated in a bargaining session pursuant to the Agreement when a dispute arose. (Id. ¶¶ 36, 38.) Mr. Carmody stated that when he told Matthews, the CNA representative, that he could take the matter to binding arbitration in compliance with the terms of the Agreement, Matthews did not state any disagreement that arbitration was the parties' agreed upon forum. (Id. ¶ 42.) Matthews ultimately filed an unfair labor practice charge against Fallbrook with the NLRB. (Id. ¶ 44.) Around July 2012, Plaintiff complains that Defendant breached the Agreement by failing and refusing to negotiate a collective bargaining agreement pursuant to the standards of bargaining defined in the Agreement for the conduct of collective bargaining negotiations between the Parties arising out of organizing activity on the part of the CNA at Fallbrook. (Id. ¶ 45.) Also, the CNA breached the Agreement by failing and refusing to submit to arbitration any disputes

that arose during and were related to the collective bargaining between Fallbrook and the CNA pursuant to the Agreement. (Id. ¶ 46.)

Plaintiff has demanded that the CNA resolve "any and all disputes that arise from and are related to the Parties' negotiations of a collective bargaining agreement in compliance with the terms and conditions of the Agreement by going through binding arbitration with a private arbitrator." (Id. ¶ 47.) The Agreement's Dispute Resolution Procedure is mandatory. (Id. ¶ 49.) Plaintiff has complied with the terms and conditions of the Agreement. (Id. ¶ 50.)

Plaintiff brings this action under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 *et seq.* against Defendant for breaching an implied-in-fact contract by failing and refusing to negotiate a collective bargaining agreement pursuant to standards of bargaining defined by the Agreement for the conduct of collective bargaining negotiations between the parties arising out of organizing activity on the part of the CNA at Fallbrook; and failing to submit any disputes that arose during and were related to the collective bargaining between Fallbrook and the CNA pursuant to the Agreement. It alleges a cause of action for breach of contract and seeks relief in the form of damages, specific performance and declaratory relief.

A. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is required only to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," and "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

A complaint may survive a motion to dismiss only if, taking all well-pleaded factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

B. Breach of Implied in Fact Contract

Defendant argues that the TAC fails to state a claim because it does not allege the existence of an implied in fact contract to arbitrate disputes. Plaintiff argues that it has properly alleged an implied in fact contract to submit all disputes to binding arbitration.

An implied-in-fact contract is a mutual agreement shown by the acts and conduct of the parties, rather than by their spoken or written words. Varni Bros. Corp. v. Wine World, Inc., 35 Cal. App. 4th 880, 888 (1995); Cal. Civ. Code § 1621 ("[a]n implied

contract is one, the existence and terms of which are manifested by conduct.") "If a written or oral contract did exist, there could be no implied contract because this would be inconsistent with an oral or written contract. Where a written or oral contract exists, any implied agreement would necessarily be an implied term of such written or oral contract . . . ." Id. at 889. The very heart of an implied promise is an intent to promise, Gorlach v. The Sports Club Co., 209 Cal. App. 4th 1497, 1507 (2013), and the conduct alleged must give rise to the specific understanding sought to be enforced, Guz v. Betchel, 24 Cal. 4th 317, 342 (2000). An implied in fact contract arises from a *mutual agreement and intent to promise* where the agreement and promise have not been expressed in words. Gorlach, 209 Cal. App. 4th at 1508 (emphasis in original) (citation omitted).

A cause of action for breach of implied contract has the same elements as a cause of action for breach of contract, except that the promise is not written or oral but is implied from the promisor's conduct. Yari v. Producers Guild of America, Inc., 161 Cal. App. 4th 172, 182 (2008); see also California Emergency Physicians Medical Group v. PacifiCare of California, 111 Cal. App. 4th 1127, 1134 (2003). The elements of a breach of contract claim are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." Careau & Co. v. Security Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1388 (1990).

Under the heading THE FORMATION AND EXECUTION OF THE AGREEMENT, the TAC alleges that "[p]ursuant to the terms and conditions of the Agreement, the CNA agreed to a standard that would apply to the Parties' negotiation of a collective bargaining agreement, insofar as the CNA agreed to a private standard developed by the Parties, whereby a private arbitrator would have jurisdiction to resolve disputes between the Parties . . . including any claim by one Party that the other Party had breached the private standard that would apply to the Parties' negotiation of a collective bargaining agreement." (Dkt. No. 20, TAC ¶ 27.) As to the "Agreement," the TAC is referencing a telephonic oral agreement made between Mr. Carmody and

Ms. Lawhon on April 12, 2012 when they agreed to apply certain terms memorialized in the most recent draft copy of the proposed LRA. (Id. ¶ 25.) Plaintiff further alleges "[a]fter the Parties agreed upon the terms of the Agreement, they ratified the Agreement by their conduct." (Id. ¶ 31.)

Defendant argues this allegation concerning the formation of the Agreement does not allege an implied in fact contract but an oral agreement to four specified terms as laid out in the TAC. The Court agrees. The TAC does not allege acts or conduct of the parties to demonstrate the existence or formation of an implied in fact contract. The TAC references an agreement made between the parties but does not allege an "oral" agreement. Interestingly, based on the Court's prior order, Plaintiff has removed reference to any "oral" agreement. (Compare Dkt. No. 20, TAC ¶ 33 with Dkt. No. 11, SAC ¶ 33.) Plaintiff does not allege the conduct that created the implied in fact agreement to arbitrate all bargaining disputes through mutual assent and intent to promise. The allegations concerning the formation of the contract reference an oral agreement, not an implied in fact contract. Therefore, Plaintiff has not alleged the existence or formation of an implied in fact contract between CNA and Fallbrook, and therefore, Plaintiff has not properly alleged a cause of action for breach of an implied in fact contract.

Defendant also argues that the TAC makes clear that Fallbrook's true complaint is that the CNA filed unfair labor practice ("ULP") charges before the National Labor Relations Board ("NLRB" or "Board") and Plaintiff cannot allege that the CNA agreed to both exclusive arbitration of bargaining disputes, its theory in prior complaints, and to non-exclusive arbitration of bargaining disputes, its theory in the instant complaint. Plaintiff contends that the TAC does not allege that the CNA violated the agreement based on its ULP charges with the Board and seeks no relief requiring to Union to abandon their Board charges.

In the prior complaints, Fallbrook alleged that the filing of unfair labor practice charges before the NLRB constituted breach of the Agreement to bring all disputes

before an arbitrator. The Court previously dismissed the complaints because Fallbrook failed to demonstrate a "clear and unmistakable" waiver of the right to file NLRB charges. (Dkt. No. 19.) Plaintiff now argues that the TAC "***does not allege the Union violated the Agreement due to the fact the Union filed ULP charges with the Board and seeks no relief requiring the Union to abandon, or to otherwise impact, their Board Charges***." (Dkt. No. 25 at 3.) Plaintiff asserts that disputes can be subject to both unfair labor practice proceedings as well as an arbitration arising out of a grievance. Therefore, the TAC now alleges that the CNA's failure to submit disputes to arbitration breached an implied in fact contract between the parties.

While Plaintiff does not allege that the CNA violated the Agreement by bringing a ULP charge before the Board and does not seek to have the CNA abandon the Board charges, the Court concludes that Plaintiff seeks to indirectly challenge the CNA's ULP charges before the Board. Plaintiff has redrafted its TAC to avoid dismissal based on the Court's prior orders. Plaintiff has given up the theory that pursuant to the terms and conditions of the oral CBA, the parties waived their right to resolve any dispute by filing an unfair labor practice charge with the NLRB and all disputes should have been submitted directly to the arbitrator. However, the TAC alleges that in July 2012, which is when the CNA filed ULP charges with the Board, the CNA breached the Agreement by failing and refusing to submit any and all disputes that arose during collective bargaining to binding arbitration. (Dkt. No. 20, TAC ¶¶ 46, 47.) In addition, it alleges the Dispute Resolution Procedure, ie arbitration, is mandatory, implying that Defendant had no choice but to bring its disputes to arbitration. (Id. ¶ 49.) While Plaintiff argues that it does not ask the CNA to abandon, or to otherwise impact, the Board charges, it defies reason that CNA would bring the same disputes before the Board and to arbitration. Moreover, Plaintiff alleges that arbitration is mandatory as to "any and all disputes" which implies that Defendant's only avenue to resolve disputes is through arbitration.

Plaintiff is essentially alleging breach of contract based on Defendant's filing of

ULP charges before the Board and its failure to submit the disputes to mandatory, binding arbitration. As such, the issue arises as to whether there was a "clear and unmistakable" waiver by Defendant of the right to file ULP charges before the Board, which Plaintiff failed to allege in prior complaints. Thus, the Court concludes the TAC fails to state a claim for breach of contract for failing to submit disputes to arbitration.

In sum, the breach of an implied in fact contract fails to state a claim as well as the relief it seeks for damages, specific performance and declaratory relief. Accordingly, the Court GRANTS Defendant's motion to dismiss the TAC for failure to state a claim for relief.

Conclusion

Based on the above, the Court GRANTS Defendant's motion to dismiss. In the prior order, the Court indicated that it would grant Plaintiff one last chance to remedy the deficiencies in the complaint which it has failed to do so. Accordingly, the Third Amended Complaint shall be dismissed with prejudice and Plaintiff is denied leave to amend. The hearing date set for June 20, 2014 shall be **vacated**.

IT IS SO ORDERED.

DATED: June 18, 2014

HON. GONZALO P. CURIEL
United States District Judge

NOT FOR PUBLICATION

FILED

JUN 15 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FALLBROOK HOSPITAL CORPORATION, DBA Fallbrook Hospital,

Plaintiff-Appellant,

v.

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) AFL-CIO,

Defendant-Appellee.

No. 14-56177

D.C. No. 3:13-cv-01233-GPC-JLB

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Submitted June 9, 2016**
Pasadena, California

Before: GOULD and HURWITZ, Circuit Judges and RESTANI,*** Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

CNA
23

Fallbrook Hospital Corporation ("Fallbrook") appeals the district court's dismissal of its Third Amended Complaint ("TAC") against the California Nurses Association/National Nurses Organizing Committee ("CNA"). The TAC alleged that CNA breached an implied agreement to arbitrate all disputes with Fallbrook and to bargain in good faith. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the district court judgment.

1. Fallbrook's allegations in support of its contention that the parties entered into an implied agreement to arbitrate all disputes are either conclusory, implausible, or inconsistent with an implied arbitration agreement. *See Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 51 Cal. Rptr. 2d 622, 628 (Cal. Ct. App. 1996) ("[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter.").

2. The arbitration claim also fails because it is premised on the contention that CNA breached an alleged implied contract for mandatory, binding arbitration by successfully pursuing a claim against Fallbrook before the National Labor Relations Board ("NLRB"). *See Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 732 (D.C. Cir. 2015) (upholding relief to CNA for Fallbrook's refusal to bargain in good faith). Under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a), 160, CNA had the right to seek relief from the NLRB. *See Nash v. Fla.*

Indus. Comm'n, 389 U.S. 235, 238 & n.3 (1967). Any waiver of a right granted by the NLRA must be "clear and unmistakable." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *see also Local Joint Exec. Bd. of Las Vegas v. NLRB*, 540 F.3d 1072, 1079 & n.10 (9th Cir. 2008) ("[T]he Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and mistakably waived its interest in the matter.") (internal quotation marks omitted).[1] The TAC does not allege such a waiver.

3. Fallbrook's opening brief does not address its claim that CNA breached an agreement to negotiate in good faith. That argument is therefore waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

AFFIRMED.

[1] We assume for purposes of this disposition that the right to pursue a claim before the NLRB is waivable. *But see Hosp. of Barstow, Inc. v. Cal. Nurses Ass'n*, No. 13-cv-1063, 2013 WL 6095559, *6-8 (C.D. Cal. Nov. 18, 2013).